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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-369

FIRCH BAKING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 27, 1973

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	13
APPENDIX:	
A—Trial Examiner's Decision	1a
B—Decision and Order of The National Labor Relations Board	29a
C—Decision of the Court of Appeals	33a
D—Order of Court of Appeals Denying Petition for Rehearing	41a
E—Order of Court of Appeals Granting Motion to Stay Issuance of Mandate	42a

CITATIONS

Cases

A. H. Belo Corporation (WFAA-TV) v. N.L.R.B., 411 F.2d 959 (5th Cir.), *cert. denied*, 396 U.S. 1007 (1969)	11

PAGE

American Ship Bldg. Co. v. *N.L.R.B.*, 380 U.S. 300 (1965) 9

N.L.R.B. v. *Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951) 9, 10

N.L.R.B. v. *Burns Security Services*, 406 U.S. 272 (1972) 6

N.L.R.B. v. *Citizens Hotel Company*, 326 F.2d 501 (5th Cir. 1964) 11

N.L.R.B. v. *Insurance Agents Union*, 361 U.S. 477 (1960) 9

N.L.R.B. v. *Katz*, 369 U.S. 736 (1962) 4, 7, 8

N.L.R.B. v. *Porter County Farm Bureau Co-op Association*, 314 F.2d 133 (7th Cir. 1963) 10

N.L.R.B. v. *Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963) 10

Statutes

National Labor Relations Act

§ 8(a), 29 U.S.C. § 158(a) 2, 5, 10

§ 10, 29 U.S.C. § 160 12

§ 10(b), 29 U.S.C. § 160(b) 3

§ 10(f), 29 U.S.C. § 160(f) 5

Judicial Code

28 U.S.C. § 1254(1) 2

Other Authorities

PAGE

Dubin and Gooch, *Unilateral Action as a Legitimate Economic Weapon: Power Bargaining by the Employer upon Expiration of the Collective Bargaining Agreement*, 37 N.Y.U.L. Rev. 666 (1962) 8

Schatzki: *The Employers' Unilateral Act—A Per Se Violation—Sometimes*, 44 Texas L. Rev. 470 (1966) 8, 9

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Firch Baking Company petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit dated May 29, 1973, which denied Firch Baking Company's petition for review and granted the National Labor Relations Board's cross-application for enforcement.

Opinions Below

The decision of Trial Examiner Owsley Vose dated June 2, 1972 is set forth in Appendix A hereto and is not reported. The decision and order of the National Labor Relations Board (Chairman Miller and members Jenkins and Kennedy) dated September 29, 1972 is set forth in Appendix B hereto and is reported at 199 N.L.R.B. No. 62, 81 LRRM 1616 (1972). The opinion of the United States Court of Appeals for the Second Circuit (Circuit Judges Smith, Mulligan and Timbers) is set forth in Appendix C, and is reported at 83 LRRM 2361 (1973), and is not yet officially reported.

Jurisdiction

The decision of the Court of Appeals was entered on May 29, 1973. A petition for rehearing or alternatively a motion for a stay of the mandate was timely filed on June 12, 1973. The petition for rehearing was denied by order entered July 6, 1973 (41a).

Petitioner's motion to stay issuance of the mandate pending application to this Court for a writ of certiorari was granted by order of the Court of Appeals entered August 1, 1973 (42a). Jurisdiction is founded on 28 U.S.C. § 1254(1).

Question Presented

Is it an unfair labor practice for an employer, upon expiration of a collective bargaining agreement, but before reaching a "bargaining impasse," to put into effect improved terms and conditions of employment that have previously been offered to, and rejected by, the union?

Statute Involved

National Labor Relations Act (hereinafter "Act") § 8(a) (1) and (5), 29 U.S.C. § 158(a) (1) and (5) provides:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

Statement of the Case

This proceeding arises out of collective bargaining between petitioner and Local 15520, International Union of District 50, Allied and Technical Workers over the terms of a new contract to replace an expiring contract. As found by the Court of Appeals, petitioner's offer for a new contract was "fully discussed" by the negotiating parties item by item on December 30, and again on December 31, 1971 and, with the exception of certain proposals that were agreed to, the offer was rejected in its entirety by the Union (35a-36a). Petitioner thereafter put the terms of its offer into effect on January 2, 1972, immediately upon expiration of the prior contract (16a). Pursuant to Act § 10(b), 29 U.S.C. § 160(b) the National Labor Relations Board (hereinafter "N.L.R.B." or "Board") issued a complaint charging that petitioner improved the terms and conditions of employment in violation of Section 8(a) (1) and (5) of the Act (A.7a).*

At an extensive evidentiary hearing, petitioner presented unrebutted evidence that on both December 30 and December 31, 1971, petitioner and the Union discussed each and every term of petitioner's proposal several times and that with the exception of several proposed clauses that were agreed to, the Union rejected the entire proposal on both dates (A.120a-123a, 209a-217a).

The trial examiner stated that the sole question presented by the Board's complaint was whether a bargaining "impasse" had been reached when petitioner put its improved wages and benefits into effect upon contract expiration (2a). The trial examiner concluded:

> "It is well settled that an employer who takes unilateral action regarding terms and conditions of em-

* Citations to the Appendix in the Court of Appeals are indicated by the prefix "A."

> ployment then in the process of being negotiated with the exclusive collective bargaining representative of his employees violates his collective bargaining obligations under Section 8(a) (5) and 8(d) of the Act unless the parties have reached an impasse in the negotiations. *N.L.R.B.* v. *Katz et al.*, 369 U.S. 736, 741-742." (19a)

The only violation found by the trial examiner was as follows:

> "By putting into effect on January 2, 1972, the economic proposals previously submitted to the aforesaid union without bargaining collectively with it concerning these proposals to an impasse, the Respondent has engaged in an unfair labor practice in violation of Section 8(a) (5) and (1) of the Act." (25a).

On September 29, 1972, the N.L.R.B. affirmed the rulings, findings and conclusions of the trial examiner, and specifically found that "no good-faith bargaining impasse had resulted when the Respondent [petitioner here] effectuated its 'fair, firm offer' ", with a citation to *N.L.R.B* v. *Katz*, 369 U.S. 736 (1962) (30a-31a). The N.L.R.B.'s order directs petitioner to cease and desist from changing the terms and conditions of employment without bargaining with the Union to an impasse about such changes (26a, 32a).

Neither the trial examiner nor the N.L.R.B. made any findings or conclusions to the effect that petitioner had violated the Act in any manner prior to January 2, 1972 or that it had committed an unfair labor practice at any time by failing to meet with the Union, by failing to yield to Union's demand for some "on the clock" bargaining, or by reason of its employee communication program or its "fair, firm offer" bargaining posture. Indeed, both the trial examiner and the N.L.R.B. noted that these issues were not presented (5a n. 1, 22a n. 2, 30a n. 2).

On October 26, 1972 petitioner petitioned the Court of Appeals to review the Board's order pursuant to Act § 10(f), 29 U.S.C. § 160(f). The Court of Appeals denied petitioner's petition for review and granted the N.L.R.B's cross-application for enforcement. It declined to pass on the "impasse" issue directly, holding that "this is not an 'impasse case' at all" (40a). The Court of Appeals nevertheless held that petitioner was lacking in "any vestige of good faith bargaining intent" and had put its proposals into effect without affording the Union adequate time for study and discussion (39a).

Reasons for Granting the Writ

Section 8(a) (5) of the Act prohibits the refusal to recognize a union as the employees' bargain agent, such as by offering the employees better or different terms than have been presented to the union. The question now presented is whether, when a management proposal has been presented to, discussed with, and rejected by, the union, an immediate offer of those same terms and conditions directly to the employees (sometimes called "unilateral action") is in unlawful derogation of the union's status as bargaining agent.

The N.L.R.B has for many years condemned as a *per se* violation of Act § 8(a) (1) and (5) an employer's conduct in putting into effect improved or different terms and conditions of employment without first bargaining with the union to an "impasse" about the proposed changes. The Courts of Appeals in the Fifth and Seventh Circuits have rejected this doctrine. This Court has not yet fully decided the issue, although it has indicated in clear dictum that an employer's offer that has been rejected by the union may thereafter be put into effect unilaterally by the employer. The Court of Appeals below, by granting enforcement of the Board's order, has held that an employer

may not immediately effectuate unilaterally the terms of a rejected offer and may not tell its employees that it intends to do so, but must first bargain for an "adequate" period of time.

The issue is a recurring one. Under the present state of the administrative and judicial decisions employers are uncertain as to what conduct is permitted. To the extent that employers fail to grant unilateral improvements because of such uncertainty, their employees are deprived of the benefits of unilateral improvement during the interim period until a contract is signed, and the likelihood of labor strife is increased. This writ should therefore be granted.

1. The Decision Of The Court Of Appeals Is Inconsistent With The Decisions Of This Court.

In *N.L.R.B.* v. *Burns Security Services*, 406 U.S. 272 (1972), this Court found that an employer had violated the Act by not recognizing a union that had represented the employees of a predecessor employer. However, in unequivocal dictum the Court stated at page 295:

> "If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice. Cf. *N.L.R.B.* v. *Katz*, 369 U.S. 736, 745 n. 12 (1962); *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 272-273 (CA2) cert. denied, 375 U.S. 834 (1963); *N.L.R.B.* v. *Southern Coach & Body Co.*, 336 F.2d 214, 217 (CA5 1964)."

The Court noted the Board's claim that all unilateral action before "impasse" is unlawful, but the Court did

not assent to that claim as a correct statement of what the Act prohibits (406 U.S. at 294).

The sole authority relied upon by the N.L.R.B. and its trial examiner in the present case for the supposed requirement for a "bargaining impasse" before "unilateral action" is taken is *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962). The question in *Katz* was as follows:

> "Is it a violation of the duty 'to bargain collectively' imposed by § 8(a) (5) of the National Labor Relations Act for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining under § 8(d) and which are in fact under discussion?" (369 U.S. at 737)

Finding that the employer had unilaterally put into effect better benefits than it had ever offered to, or discussed with, the union, this Court concluded that the employer had violated its duty to bargain collectively. However, the Court did not hold that the employer must wait until an "impasse" has been reached before taking "unilateral action". What the Court was concerned with in *Katz* was the attempt to by-pass the union as bargaining agent by putting into effect terms that had never been presented to the union. Thus the holding of *Katz* is simply as follows:

> "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." (369 U.S. at 747)

The situation presented here of an offer that has been discussed with, and rejected by, the union was both con-

sidered and distinguished in *Katz*, where the Court stated in footnote 12:

> "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low. See *Labor Board* v. *Bradley Washfountain Co.*, 192 F.2d 144, 150-152; *Labor Board* v. *Landis Tool Co.*, 193 F.2d 279."

Although the issue to which the above-quoted dictum was directed has not as yet been decided by a definite holding of this Court, the inconsistency between the Board's requirement for "bargaining impasse" before "unilateral action" is taken and the decisions of this Court has been noted by thoughtful commentators. Thus, the Board's position in this regard has been described as a view "discredited by the Supreme Court as clearly contrary to congressional intent". Dubin and Gooch, *Unilateral Action as a Legitimate Economic Weapon: Power Bargaining by the Employer upon Expiration of the Collective Bargaining Agreement*, 37 N.Y.U.L. Rev. 666, 711 (1962).

More recently, Professor George Schatzki has noted the logical inconsistency of the Board's position, and has put the matter as follows in Schatzki, *The Employer's Unilateral Act—a Per Se Violation—Sometimes*, 44 Texas L. Rev. 470, 497 (1966):

> "It appears somewhat unfair to require the employer to wait for an impasse in bargaining before effectuating his proposals; employees have never been so obligated before striking. Indeed, having the benefits of the unilateral action, the employees will no longer have such a strong desire to strike, and industrial strife may be lessened. The Board's present doctrine is ironic in that once the employees have struck, even if before impasse,

> the employer is entitled to hire replacements or woo back strikers at the level of his best offer during negotiations; yet he is not permitted to do this before a strike unless there has been an impasse. Moreover, the unilateral action is a sure way to impress upon the employees the bona fides of the employer's dealings at the bargaining table. Therefore, where the employer acts to avoid an imminent strike, it is erroneous to condemn the unilateral changes of employment which are consistent with bargaining proposals rejected by the union. To deprive the employer of this protection and this attempt to preserve industrial peace is not only improper for the reasons stated, but it is also inconsistent with the reasoning of the *Insurance Agents* and *American Ship Bldg.* cases. These cases make it clear that economic action to preserve and foster one's bargaining position is not only proper but desirable under the scheme of the Act. It is somewhat odd that the Board has always permitted defensive lockouts but has never openly recognized the defensive unilateral increase."*

Professor Schatzki concludes that the Board's blanket prohibition on employer unilateral action "cannot be squared with the Supreme Court decisions, with the purposes of the Act, or with common sense" (id. p. 508).

2. The Decision Below Is In Conflict With The Decisions Of The Courts Of Appeals In The Fifth And Seventh Circuits.

In *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951), the question was presented whether unilateral improvement of the economic terms of employment, after they had been presented to and rejected by the union, but before bargaining impasse, constituted a violation of Sec-

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* The cited cases are *N.L.R.B.* v. *Insurance Agents Union*, 361 U.S. 477 (1960) and *American Ship Bldg. Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965).

tion 8(a) of the Act. The court, citing both Supreme Court and N.L.R.B. decisions, held that such unilateral conduct "should be encouraged rather than discouraged" (192 F.2d at 150.

In *N.L.R.B.* v. *Porter County Farm Bureau Co-op Association*, 314 F.2d 133 (7th Cir. 1963), the court held that an employer could unilaterally grant benefits after termination of a contract, and the opinion discloses no exhaustion of bargaining with the union.

In *N.L.R.B.* v. *Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963), the court stated on page 481:

> "Of course, before instituting wage changes of a kind which constitutes a subject of mandatory bargaining, there is the statutory duty to first 'meet * * * and confer in good faith * * *.' § 8(d). But it is a mistake to assume that where there has been such discussion and fair notice of the employer's intended actions, it is a violation of the law to institute such changes without securing the agreement of the Union. In N.L.R.B. v. Crompton-Highland Mills, 1949, 337 U.S. 217, 224, 69 S. Ct. 960, 963, 93 L. Ed. 1320, the Court early recognized that 'a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining * * * left unaccepted or even rejected in those negotiations * * * might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations. * * *' * * * And more recently in N.L.R.B. v. Katz, 1962, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 230, * * * the Court recognizes that an employer may 'unilaterally' grant increases no greater than those previously offered. In expressing this negatively, the Court in note 12 took notice of the Bradley Wash-

> fountain case in which the 7th Circuit held that a wage increase which was less than the union's demand could be granted legally during negotiations."

Similarly, in *N.L.R.B.* v. *Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964), the court stated:

> "It is true, of course, as recently pointed out in N.L.R.B v. Tex-Tan, Inc. 5th Cir. 1963, 318 F.2d 472, 479-481, that an employer may make changes without the approval of the union as bargaining agent. The union has no absolute veto power under the act. Nor do negotiations necessarily have to exhaust themselves to the point of the so-called 'impasse.' "

In *A. H. Belo Corporation (WFAA-TV)* v. *N.L.R.B.*, 411 F.2d 959, 971 (5th Cir.), *cert. denied*, 396 U.S. 1007 (1969), the court stated:

> "We are of the opinion that since the subject of the Cedar Hill wage change had been raised during negotiations and the company gave the union notice of its proposed change, there was nothing unlawful in subsequently making the change. The Board's apparent error was in assuming that any unilateral change during bargaining is *per se* illegal."

3. The Decision Below Is Anomalous In That It Prohibits What It Does Not Hold Unlawful And Holds Unlawful What It Does Not Prohibit And Is Based On New Findings And Conclusions Within The Board's Exclusive Primary Jurisdiction.

The trial examiner and the N.L.R.B. expressly refused to review the propriety of petitioner's bargaining strategy and employee communication program "because of the narrow issue presented by the complaint in this case" (5a, n.1, 30a, n.2).

Neither the trial examiner nor the N.L.R.B. made any finding or conclusion that petitioner had violated the Act prior to its unilateral action on January 2, 1972 or that it had committed an unfair labor practice at any time by failing to meet with the Union, by failing to yield to Union's demand for some "on the clock" bargaining, or by reason of its employee communication program or its "fair, firm offer" bargaining posture. Indeed, both the trial examiner and the N.L.R.B. noted that these issues were not presented (5a n. 1, 22a n. 2, 30a n. 2).

In conformity with the narrow issue decided by the trial examiner and the Board, the Board's order would require petitioner to cease and desist from "changing the wages, hours or other terms and conditions of employment of the employees in the appropriate unit without bargaining collectively with the aforesaid union to an impasse about such changes" (26a).

The Court of Appeals declined to pass upon the narrow legal issue considered by the trial examiner and the Board, holding instead that "this is not an 'impasse case' at all" (40a).

The anomalous result is to prohibit petitioner from unilateral action before impasse upon a holding that this is not an impasse case at all.

Although the Court of Appeals found bad faith intent, unlawful communication with employees and a too rigid bargaining posture, such conduct is not specifically prohibited by the order that the Court below would now enforce. Moreover, these findings were not predicated upon any such findings or holdings of the Board, although such findings are within the Board's exclusive primary jurisdiction. Act § 10, 29 U.S.C. § 160.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 1973

APPENDIX A

Trial Examiner's Decision of June 2, 1972

TXD-377-72
Jamestown, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 3-CA-4719

FIRCH BAKING COMPANY OF JAMESTOWN, INC.

Respondent

and

LOCAL 15520, INTERNATIONAL UNION OF DISTRICT 50,
ALLIED AND TECHNICAL WORKERS

Charging Party

Gary H. Feinberg, of Buffalo, N.Y., for the General Counsel.

Thomas Washington, of Buffalo, N.Y., for the Charging Party.

Joseph P. Carey of New York, N.Y., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

OWSLEY VOSE, Trial Examiner: This case was heard at Jamestown, New York, on March 27 and 28, 1972, pursuant to a charge filed on December 29, 1971, and a complaint is-

sued on February 16, 1972. The only issue raised by the complaint is whether the action of the Respondent, herein sometimes called the Company, in instituting certain changes in wages and other conditions of employment during the pendency of collective-bargaining negotiations violated the Company's obligations under Section 8(a)(5) and (1) of the Act. The resolution of this question turns upon whether the parties had reached an impasse in the negotiations at the time the action was taken.

Upon the entire record and my observation of the witnesses, and after due consideration of the brief filed by the Company, I make the following:

Findings and Conclusions

I. The Business of the Company

The Company is a division of Firch Baking Company, Inc., a Pennsylvania corporation, which is a wholly-owned subsidiary of Kane-Miller Corp. The Company is engaged at Jamestown and Olean, New York, in the production, sale and distribution of baked goods. During the year preceding the issuance of complaint the Respondent caused to be delivered to its Jamestown, New York, plant from out-of-States sources more than $50,000 worth of raw materials and supplies. Upon the foregoing undenied facts I find that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local 15520, International Union of District 50, Allied and Technical Workers, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

Appendix A.

III. The Unfair Labor Practices

A. *The Respondent's Unilateral Action in Violation of Section 8(a)(5) and (1) of the Act*

1. Background

The Company for some time in the past has had collective bargaining contracts with unions representing four units of its employees. Local 15520, the Union here involved, represents the employees in two of these units, one consisting of certain production employees working inside the Jamestown bakery, and the other consisting of the Company's various drivers, including wholesale driver-salesmen and transport drivers, and also sales clerks at the Company's Thrift Stores at Jamestown and Olean. The instant case involves the Company's alleged unilateral action during collective bargaining negotiations with Union as the representative of the employees in the latter-stated unit, the drivers and sales clerks unit.

The labor contract covering the employees in this unit, dated January 8, 1969, by its terms automatically renewed itself on midnight January 1, 1972, unless notice of a desire to cancel, terminate, or modify the contract was given the other party the requisite period before the automatic renewal date. On October 27, 1971, the Union mailed to the Company a notice of its desire to modify or terminate the contract.

As stated more fully below, the first bargaining session was held on November 10, 1971. Thereafter nine additional bargaining meetings were held in November, December and January 1972. At the insistence of the Company, all these meetings were held during nonworking hours.

The Company's bargaining committee consisted of 11 members, including its president, vice president, secretary-treasurer, the Jamestown plant general manager, the office manager at Jamestown, the supervisor of terminal opera-

tions at both Jamestown and Olean, three supervisors at Olean and three supervisors at Jamestown, including one who supervised the tractor-trailer division. Secretary-Treasurer James Cullen was the principal spokesman for the Company. John Dwyer, the president of the Company, attended only one or two meetings, including the first.

The Union's bargaining committee was composed of Thomas Washington, an International representative of the Union, and six employee members, including Union President Kenneth Eklund. Washington was the Union's principal negotiator.

The employees in the bargaining unit work a 5-day week, during days for the most part, and have Wednesdays and Sundays off. Because of the Company's continued insistence that all negotiations be carried on during nonworking hours, this meant that the only sustained periods available for negotiations were on Wednesdays and Sundays.

2. Sequence of Events

Because of the narrow issue in this case I find it unnecessary to treat the discussions at the various bargaining meetings in detail. I believe that it will suffice if I state in general terms the events at bargaining meetings and the other intervening events which cast light on the question whether an impasse in the negotiations had been reached at the time the Company instituted the changes in wages and working conditions which the General Counsel complains were put into effect without adequate consultation with the Union.

11–10–71 *First bargaining meeting.* The Union submitted a four-page document listing proposed changes in the existing contract, explained its proposals, and invited questions regarding them. One of the Union's new proposals contemplated bargaining during working hours during the last week of

the contract term. The Company took the position that it was not possible to have supervisors relieve Union committee members so they could participate in the bargaining sessions, asserting that the supervisors could not be spared from the regular duties for the full day that would be required. The Union proposed to reduce the number of employee members on the bargaining committee so as to lessen the burden on the Company. However, the Company said that this would not work.

11–17–71 *Second bargaining meeting.* After a discussion of the Union's demands, which the Company characterized as "astronomical," the Company stated that the Company, after evaluating its future prospects would make a "fair firm offer" which it indicated would be both fair and final.[1] The Union proposed that the Company agree to engage in some bargaining during working hours to demonstrate its good faith and indicated that as little as 25 percent of the bargaining during working hours would satisfy it. The Company said this was impossible.

11–30–71 The Company handed to each of the employees in the unit the first of its letters in its employee

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[1] Admittedly in respect to making its "fair firm offer" and in conducting an employee communications program, the Company was patterning its bargaining strategy after that engaged in by the General Electric in *N.L.R.B.* v. *General Electric Co.*, 418 F. 2d 736 (C.A. 2), certiorari denied, 397 U.S. 695. While the Second Circuit, with Judge Friendly dissenting in part, upheld the Board's findings of violations of Section 8(a)(5) of the Act by General Electric, in the Company's view, the majority opinion of the Second Circuit sanctions its course of conduct in this case. Because of the narrow issue presented by the complaint in this case I do not reach this question.

communications program. The Company also mailed the letters to the employees' homes. This was the procedure followed with respect to all letters sent to employees in connection with its employee communications program. In the letter, after stressing the precarious condition of the Jamestown bakery as an independent entity and the need for giving management flexibility in its operations if the employees were to enjoy "a good, steady job," the Company invited the employees to communicate with Company officials and supervisors concerning the negotiations and to give their ideas and opinions. The Company also emphasized the need for the scheduling a number of bargaining meetings before the contract expired and attached a proposed schedule of 15 meetings, all during nonworking hours.

12– 1–71 *Third bargaining meeting.* This meeting opened with a further discussion of future meeting dates. International Representative Washington indicated that he did not negotiate on Sundays. The Union stated that the setting of bargaining dates was a matter to be mutually agreed upon and proposed that supervisors relieve the few employees involved on a reduced Union bargaining committee so that they could attend during working hours. The Union pointed out that this was what was done when the employees were sick or were on vacation. The Company's response was that it needed all its supervisors at the bargaining table. The Company presented a completely rewritten proposed draft of a contract covering most of the noneconomic matters dealt with in the 1969 contract. Included were union security

and dues check off provisions and a provision for compulsory arbitration. The provisions of the Company's proposed draft, as well as the Union's proposals, were discussed but no agreement on any of the provisions was reached. The Union committee left without any date being set for the next meeting. As it did so, Cullen asked about Washington about a future meeting date. Washington replied that no further meetings were scheduled and that none would be until the Company made some concessions with regard to bargaining "on the clock."

12- 2-71 The Company issued its second letter in its employee communications program in which, after mentioning, among other things, Washington's refusal to meet on Saturday, December 4 (at 6 p.m.) unless the Company agreed to meet at noon on Monday, December 6, it characterized Washington's action as *"outrageous, arrogant* and *unfair,"* and stated that it was the Company's intention, if Washington refused to meet on Saturday, December 4 except on condition that the Company also meet during working hours on the following Monday, to file unfair labor practice charges against the Union based on Washington's conduct.

12- 2-71 The Company wrote Washington a letter stating that his insistence on meeting during working hours on December 6 constituted a refusal to bargain collectively and would be the subject of charges filed with the Board unless he ceased such insistence.

12- 7-71 Washington replied, stating that the Union was "willing to concede" that "most" of the bar-

gaining be carried on during nonworking hours, but that it was unwilling to agree that "100%" be conducted in off-duty hours.

12- 7-71 The Company replied to Washington, refusing to acquiesce in Washington's insistence that the Company agree to some bargaining during working hours, stating that this "is tantamount to dictating the size of our Committee" and that the Company "needs the services of all its [Committee] members at the bargaining table." The Company suggested bargaining meetings on Saturday and/or Sunday, December 11 or 12 during nonworking hours.

12-15-71 *Fourth bargaining meeting.* Before commencing the negotiations the parties discussed the next meeting date. The Union urged that it was customary for supervisors to replace route salesmen when they were ill and that it saw no reason why they could not occasionally replace three of the Union's six employee committeemen while they were attending bargaining sessions. The Union proposed Friday, May 17, at 9 a.m., during working hours, for the next meeting. From the discussions at this meeting and a prior telephone conversation between President Dwyer and Washington, the Union received the impression that the Company was acquiescing in holding the proposed Friday bargaining session during working hours. The Company presented a rewritten proposed draft of the remaining noneconomic matters not covered in its December 1 draft. A discussion followed of the provisions of both the Company's December 1 and December 15 drafts. The Union agreed to a number of

the provisions of the Company's December 1 draft and to one of the provisions of the December 15 draft. The Company announced that its economic proposals, which it termed its "fair firm offer" would be forthcoming in the next day or two. The discussion turned to the next meeting date. From comments of Company negotiators it appeared to the Union that the Company was going back on its tentative agreement to meet during working hours on the following Friday. To Washington's question as to whether there would be any repercussions if three employee members of the Union bargaining committee attended this meeting during working hours, Cullen replied, "Yes," that the Company "would have to take whatever disciplinary actions were necessary under the circumstances." Washington replied that he had been "tricked" into participating in this bargaining session and with that picked up his papers and walked out of the meeting room. The employee members of the bargaining committee quickly followed.

12–17–71 The Company distributed its third letter in its employee communications program. It is devoted largely to the disagreement between the Company and the Union regarding "off-the-clock" versus "on-the-clock" bargaining and the consequent difficulties of scheduling future bargaining meetings. The letter states, in part, as follows:

> As we have said time and time again, we can't allow the Union to dictate a condition that pulls the Supervisors away from the bargaining table so that the Union Committee Employees

can be at the bargaining table! What motive does Mr. Washington have for this?

We also repeated our willingness to meet every day or night until December 31, 1971, with our whole Committee, of course, but his offer was again brushed aside by Mr. Washington. So we are no further ahead than we were on December 1, and there are only 15 days until the contract expires. What does Mr. Washington propose to do then? We suspect that he will be looking for an extension of the labor contract to make up for the time that he has caused everyone to lose with his silly games! Well, there will be no extension of the contract. If Management cannot persuade Mr. Washington to bargain in good faith and come back to the bargaining table, then we will have no alternative but to make our fair, firm, economic offer to the Union Committee by mail! If this fair, firm offer is not accepted by Mr. Washington, and the time runs out on Mr. Washington then we will be legally entitled to make this offer directly to all of our employees—because we must keep the Bakery running! The livelihood of 160 working people depend on Management to meet their responsibilities.

The letter accuses Washington of acting unlawfully in attempting to obtain any bargaining during working hours and concludes with an invitation to the employees to contact company officials or their supervisors if they have questions or opinions to express.

12–20–71 Company negotiator Cullen met with Washington at Dunkirk, New York, in the presence of

Federal Mediator Samuel Sackman. This meeting had been arranged by Sackman at the request of the Company. Cullen opened the meeting by reiterating the Company's insistence that it could not allow supervisors to replace employee committeemen to enable them to participate in bargaining sessions during working hours. Washington with equal firmness replied, as Cullen testified, that "some on-the-clock bargaining had to take place or we would not be back to the bargaining table." Sackman proposed a meeting on Tuesday, on December 28, at 6 p.m. (nonworking hours), Wednesday, December 29, at 10 a.m. (nonworking hours), December 30 at 2 p.m. (working hours), and 2 p.m. on December 31, (working hours). Cullen rejected Sackman's proposal and explained to Washington that bargaining on the clock "couldn't be because it would effect the operations" and that it had never been done in the past in the sales department. Cullen persisted in his refusal to accept Sackman's "package" explaining after consulting President Dwyer in Erie, Pennsylvania, over the telephone, that it included "on-the-clock" bargaining dates and "we could not have supervision substituting for the Union Bargaining Committee." Washington indicated that he had wasted his time in coming to Dunkirk, stating that the Union "had gone 80 percent of the way in this and that was the end of it." This is Cullen's testimony. The meeting ended with no further meetings scheduled.

12–27–71 The Company presented to the employee members of the Union bargaining committee a letter enclosing the Company's "fair, firm offer" re-

garding economic matters. The offer includes increases in wages, changed pension benefits, changed health coverage and improved major medical benefits. The Company's offer was in outline form and not in the form of proposed contractual provisions. The details concerning the changes in the pension plan were not set forth in the Company's offer.

12–27–71 The Company distributed its fourth letter to employees. Enclosed with the letter were copies of an exchange of telegrams between the Company and Washington concerning proposed meeting dates, a copy of the Company's letter to the Union enclosing its "fair, firm offer," and the offer itself. The letter states in part as follows:

> . . . The Labor law has changed since we negotiated our last contract. The former practice whereby the Employer started negotiations with an unrealistically low offer and worked upward, is no longer necessary. Management has worked long and hard on the formulation of this fair firm offer, and we can sincerely say that it truly is as fair as it is firm. Our earlier letters have told you about our economic picture and how we have survived where other bakeries have not. Moreover, this offer is substantially in excess of the 5.5% maximum allowed by the U.S. Government and of course is subject to approval of and application to the Pay Board. As you know, an Employer's prices can be increased only 2½%, and the Price Board has already ruled that an Employer can not obtain approval of price increases to match even approved pay increases!

Appendix A.

As I have mentioned in my last letter to you, if the Union still refused to come to the bargaining table without imposing illegal conditions we will have no alternative but to file unfair labor practice charges against the Union with the National Labor Relations Board. Our labor attorney is now preparing these charges which will be filed with the National Labor Relations Board January 3. Since time is running out, this offer will be made directly to all of our employees effective 12:01 a.m., January 2, 1972.

We sincerely say that we agree with U.S. Mediator Sackman that there is no reason why that there has to be a strike on January 2, just because the contract expires. Looking back on all of what has happened these past two months with Mr. Washington, it appears that his motive right along has been to pull a strike against the Employer. There is no other reasonable explanation for his behavior.

12–29–71 Washington saw for the first time the Company's "fair, firm" offer.

12–29–71 Washington sent the following telegram to the Company;

I AM STILL WILLING TO GO 75 PERCENT WITH THE COMPANY ON NEGOTIATION DATES AS LONG AS THE COMPANY SHOWS SOME GOOD FAITH. I WILL STILL MEET THE OFFER I MADE TO YOU IN MEDIATION ON DEC. 20, 1971 AT THE VINEYARD MOTEL. WE DO NOT WANT TO HOLD ALL THESE NEGOTIATIONS ON COMPANY TIME. WE HAVE STATED THIS AT EVERY MEETING WE ARE WILLING AND READY TO MEET IMMEDIATELY ON MUTUALLY AGREED TIME.

Appendix A.

12-29-71 The Union filed a charge with the Board's Regional Office alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to meet at reasonable times for bargaining purposes and by attempting to by-pass the Union and deal directly with the employees.

12-30-71 The Company issued its fifth letter to the employees. In it, after informing the employees that their dues checkoff authorizations would expire on January 1, 1972, and explaining that they would be reimbursed for the January dues which had already been deducted from their paychecks, the Company stated, in part, as follows:

> As we have said, management has the responsibility to 160 working people and their families, of keeping the bakery running. The union will be legally entitled to strike at 12:01 AM, January 2nd. We don't know if they will. We do know that the production and maintenance employees inside the bakery must continue to work because that contract with Local Union 14030 does not expire until March 11, 1972. In the event that the union does not accept our fair, firm offer by the time that the contract expires, we have no alternative but to make our fair, firm offer to you directly. And, of course, we sincerely hope that you will accept it and continue on the job. In the event that any group of employees refuses to accept the offer, then they will be legally replaced by permanent new hires. We sincerely hope that this will not be necessary.

12-30-71 *Fifth bargaining meeting.* This meeting was arranged by Federal Mediator Sackman at the request of the Company. The Company's eco-

nomic offer was discussed item by item. Washington, declaring that the offer was neither fair nor firm, rejected it in its entirety. He nevertheless, continued to discuss various provisions of the offer with the Company committee. A discussion of the Company's noneconomic proposals of December 15 ensued and the Union agreed to two provisions of this proposal at this meeting. The parties agreed to meet at 6 p.m. the following day for a further meeting.

12–31–71 *Sixth bargaining meeting.* The Company presented the Union with a document elaborating upon, and setting forth in contract language, the Company's "fair, firm offer." The Company also provided the Union with a copy of the Kane-Miller Corp. Employees' Retirement Plan which is referred to in the Company's "fair firm offer," but did not furnish copies of the Kane-Miller Master Insurance Plan, referred to in its offer, which contains the details of the medical, surgical and term life insurance coverage which the Company was proposing to substitute for the coverage provided under the 1969 contract. Copies of the documents setting for the details of the previous coverage were given to the Union at this meeting, however. The parties first discussed the contract language in the Company's December 1 and 15 proposals. Then the parties turned to the Company's economic proposals. The various items were discussed several times. The Company sought to explain the advantages of the proposed retirement program. The union retreated from its demand for 5 percent commission and accepted the Company's proposal for a 3½ percent commission on drop sales. The parties also agreed on several other provisions

of the Company's "fair, firm offer", namely provisions concerning eligibility for holiday benefits, various provisions relating to vacation benefits, and several miscellaneous noncost items. As the meeting ended at 11:45 p.m. Washington announced that he was going to have a Federal Mediator at the next meeting.

1– 1–72 At midnight, when the 1969 contract expired, the Company put into effect its "fair, firm offer" in its entirety, including the various provisions for wage increases and improved employee benefits.

1– 4–72 The Company issued its sixth letter in its employee communications program in which it discussed the Union's charge filed with the Board and the asserted lack of foundation for such a charge. In the letter the Company, after commenting that Washington was poorly advised on labor law, stated that Washington had bargained "to a deadlock on an illegal condition," i.e., Union's demand for "some" bargaining during working hours. The letter concluded with the announcement that "our unilateral offer to all of you has been in effect since 12:01 a.m. Sunday, January 2."

1– 6–72 *Seventh bargaining meeting.* The parties discussed the Company's economic proposals which had been submitted in final form on December 31, after which the Company announced that it had put these proposals into effect on January 2. Emphasizing the finality of its action, the Company stated, as Washington testified, "that the law had been changed and they were able now to give us one offer. They didn't have to start

low and the Union start high and work their way in between any more." Neither of the parties changed positions regarding the economic actions taken by the Company.

1–15–72 The Company issued its seventh letter to the employees in which it reported briefly on the bargaining session of January 6, 1972, and announced that a further meeting was scheduled for January 19. The letter concluded with an expression of thanks to the employees for continuing on the job despite the expiration of the contract. (At no time during the negotiations had any suggestion been made by the Union that a strike would occur upon the expiration of the contract if agreement were not reached by that time. Nor had the employees here involved gone out on strike in the past.)

1–15–72 The Union held a meeting of its members at which the failure to reach agreement with the Company was discussed. It was decided to continue bargaining until February 1 and then decide what course to pursue.

1–19–72 *Eighth bargaining meeting.* The parties discussed contract language and some agreements were reached on noneconomic matters. The Union dropped a few items from its list of proposed contract changes. The Union asked if the Company was willing to move on any of the economic items. The Company replied that its offer (which had been put into effect) is "as fair as it is firm and it's firm as it is fair."

1–23–72 *Ninth bargaining meeting.* A further discussion of the Company's contract language took place and agreements were reached on a few

items, including agreement by the Company to shorten its proposed probationary period. The Company continued to insist on the Union agreeing to the Company's "fair, firm offer" on economic matters as a package.

1–26–72 *Tenth bargaining meeting.* The Union agreed to two more provisions in the Company's proposals and dropped a number of items from its list of proposed contract changes, including proposed additional holidays, additional funeral leave pay, pay for time spent processing grievances, and Company-furnished uniforms (under the expired contract the Company paid one-half of the cost of the uniforms). The Company stated concerning its "fair, firm offer," as Washington testified, that "this was it, this was as far as they could go." The Union refused to agree to these proposals, but stated that it would submit the proposals to the employees in order to determine whether they would be acceptable to them.

1–31–72 The Company handed to the employees the eighth and final letter in its employee communications program. In it the Company reported that it had met with the Union on January 23 and 26 and invited all the employees in the unit to a luncheon on the following Wednesday (their day off) to hear an explanation about the Company's contract language and to enable them to ask questions about the Company's proposals.

2– 1–72 At a union meeting the employees voted to accept the Company's proposals of December 1, December 15 and December 31 (the "fair, firm offer" concerning economic items), as modified during the negotiations.

Appendix A.

2- 2-72 The provisions of all three of the Company's proposals were consolidated into a single document and submitted to the Union for proofreading.

2-16-72 The consolidated proposals, constituting a comprehensive collective-bargaining contract expiring on December 31, 1974, were signed by the Company and the Union.

3. Conclusions

It is well settled that an employer who takes unilateral action regarding terms and conditions of employment then in the process of being negotiated with the exclusive collective bargaining representative of his employees violates his collective bargaining obligations under Section 8(a)(5) and 8(d) of the Act unless the parties have reached an impasse in the negotiations. *N.L.R.B.* v. *Katz et al.*, 369 U.S. 736, 741-742. The Company does not dispute this legal proposition, but contends that the record in this case justifies the conclusion that an impasse had been reached at the time it put its "fair, firm offer" containing its economic proposals into effect at midnight on January 1, 1972. I cannot agree.

The Respondent announced its intention to place its "fair, firm offer" directly before the employees as a whole at midnight on January 1 simultaneously with its initial presentation of its economic proposals to the Union committeemen and the employees as a whole on December 27. This was after only four bargaining conferences in November and December and before the Union's principal negotiator had even had a chance to see the Company's economic proposals. The negotiations were actually only getting started at this time and there is no suggestion in the record that either of the parties regarded the negotiations as having bogged down over substantive matters at

this early stage. The parties were still in the early, probing stage of the negotiations.

On December 30, before the fifth bargaining meeting that evening, the Company in its letter to the employees reiterated its intention to go to the employees directly with its "fair, firm offer" upon the expiration of the contract whether or not the Union in the meantime agreed to its proposals.

While the Union, at the bargaining session on the evening of December 30, rejected the Company's "fair, firm offer" in its entirety, it agreed to meet the following evening for a further bargaining session. At this meeting on December 31 the Union agreed to several provisions contained in the Company's "fair, firm offer." When this meeting terminated the Union announced that it would have a Federal Mediator at the next meeting and it appears that both parties contemplated at this time that further meetings would be held.

At this time the Union had not been furnished with copies of the Kane-Miller Master Insurance plan containing the details concerning the Company's proposed changes in medical, surgical, and term life insurance coverage, which were among the proposals which the Company stated in its letters that it intended to put into effect upon the expiration of the contract. Although the Company insurance proposals contemplated a change in insurance carriers, the parties by the close of the December 31 meeting had only begun to discuss this change, which is an obligatory subject of collective bargaining. See *Wisconsin Southern Gas Company,* 173 NLRB 480, 483-484.

After the December 31 bargaining meeting the parties held four more bargaining sessions in January and these negotiations culminated in a comprehensive 2-year collective bargaining contract which was signed by the parties on February 16, 1972. The facts of the case as a

whole, in my opinion, clearly warrant the conclusion that no impasse had been reached when the Respondent took its unilateral action regarding its economic proposals at midnight on January 1, 1972.

The Respondent does not articulate the basis for its claim of impasse but instead relies almost exclusively on the Board's decision in *Midwest Casting Corporation*, 194 NLRB No. 91, which is discussed in some detail below. Some of the language in the Company's letters to the employees in which it charged Union Representative Washington with unlawfully bargaining "to a deadlock" over the Union's demand that the Company should agree to hold some bargaining sessions during working hours suggests that the Company may be contending that the parties were at an impasse over this issue. However, in view of the fact that the Union, in response to the prodding of the Company and a Federal Mediator, ultimately capitulated and participated in bargining exclusively during nonworking hours, it is unreasonable to conclude that the parties were at an impasse over this issue when it placed its "fair, firm offer" into effect at midnight on January 1. And in view of the further fact that the Union bargained during nonworking hours on the evening of December 30 and until 11:45 p.m. on December 31 (New Year's Eve), just 1 day before the Company took the unilateral action herein complained of, it is manifestly unreasonable to say that the parties had reached an impasse over this issue at this time.[2]

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[2] It may be observed in passing that the Company's inflexible position on the issue of "on-the-clock" versus "off-the-clock" bargaining introduced a discordant note into the negotiations at the outset which rendered the negotiations unnecessarily difficult. I do not believe that it is true, as claimed by the Respondent, that it required the services of all six of the minor supervisors

(footnote continued on following page)

Appendix A.

With respect to the Board's decision in the *Midwest Casting* case upon which the company relies, the Trial Examiner

(footnote continued from preceding page)

whom it placed upon its bargaining committee (in addition to its five top officials) at each and every bargaining conference. And this claim is not altogether consistent with the Company's further contention that it could not spare the services of these supervisors to substitute for any of the drivers on the Union's bargaining committees because it required them at their posts to perform their normal supervisory and servicing of customers' functions. As the Union pointed out, the Company utilized some of these supervisors to substitute for drivers when they were ill or were on vacation. In my opinion the record warrants the conclusion that the Company did not seriously consider the resolution of this disagreement on any basis other than the Union's complete capitulation to the Company's demand that all bargaining be carried on during nonworking hours. While the Union was seeking to have at least 25 percent of the bargaining sessions conducted during working hours and with three employee committeemen present, had the Company had an open mind on this issue it is possible that the controversy could have been resolved on a basis that would have been more acceptable to the Company, i.e., with a lesser percentage of time spent in bargaining during working hours and with fewer employee committeemen present. Because of the Company's rigid position on this issue, the parties never reached the question whether the committemen should be paid for the time spent negotiating during working hours. The Company never raised this as an objection to bargaining during working hours. Of course the Union could not inflexibly insist on employee committeemen being paid for time spent negotiating. It is not my intention to suggest by this discussion that had the Respondent fully explored all of the possible alternatives that it could not have adhered to its position that all bargaining should be conducted during nonworking hours.

In view of the Company's inflexible position on the issue of "on-the-clock" versus "off-the-clock" bargaining and the use made by the Company of the disagreement between the parties concerning this issue in its employee communications program, I conclude that the Respondent seized upon the disagreement between the parties on this issue as a vehicle for attacking the Union and disparaging the motives of the Union representative, in an effort to undermine the employees' support for the Union and thereby obtain a better bargain for itself. Whether this is a lawful bargaining strategy under the circumstances of the case is, of course, not before me because this issue was not raised by the complaint.

in that case concluded, with Board approval, on facts quite similar to those in the case at bar, that the parties had reached an impasse on the wage issue before the employer put his last wage offer into effect and that the employer's action, therefore, was not unlawful. In this connection the Trial Examiner noted that neither the Union nor the employees protested against the employer's action and in fact "acquiesced in the wage increase and continued to work at the higher wage until such time as they chose to strike."

The facts of the *Midwest Casting* case are distinguishable from those in the case at bar in two respects, at least, in my opinion. In the *Midwest Casting* case at the bargaining meeting held the day before the employer announced that he was going to put into effect its final "wage package" regardless of whether the union accepted it or not, the negotiations were in such a deadlock that no further meetings were arranged. Also, the Federal Mediator present at this meeting stated to both parties "that he felt that there was no room for a settlement." In the instant case, as found above, at the final meeting before the company's economic offer was to become effective, progress in reducing the differences between the parties was achieved, "which negated the proposition that there was no prospect of further movement." *F. A. Reynolds Co., Inc.*, 173 NLRB 418, 424; enforced, 424 F. 2d 1068 (C.A. 5). In addition, the December 31 meeting ended with the parties contemplating that further meetings would be held in which a Federal Mediator would participate.

With respect to the Trial Examiner's comments in the *Midwest Casting* case about the failure of the Union or the employees to protest the employer's action in putting its "wage package" into effect, my reading of the cases convinces me that such failure to protest is without legal significance in cases such as this. As stated by the Trial Examiner, with Board approval, in *Webb Furniture Corporation*, 158

NLRB 1003, 1007, enforced 366 F. 2d 314 (C.A. 4):

> If I understand the controlling decisions of the Board then District 50 did not by mere silence on this issue during the last meeting with the Respondent agree that Respondent should have the right to continue unilateral action on wage increases.

To the same effect are *J. H. Bonck Company, Inc.*, 170 NLRB 1471, 1478, enforced 424 F. 2d 634, 638-639 (C.A. 5) and *Bierl Supply Company*, 179 NLRB 741.

Upon all of the facts of the case I conclude that the parties had not reached an impasse in any areas of the negotiations at the time the Respondent put into effect at midnight on January 1, 1972, the economic proposals first submitted by it to the Union committeemen in summary form on December 27, 1971. Accordingly, the Company's unilateral action regarding its economic proposals violated Section 8(a)(5) and (1) of the Act. See *Terry Industries of Virginia, Inc.*, 188 NLRB No. 102.

Conclusions of Law

1. At all times on and after October 27, 1971, Local 15520, International Union of District 50, Allied and Technical Workers, has been the exclusive collective bargaining representative of the Respondent's employees in the following appropriate unit:

> Wholesale driver-salesmen, wholesale extra driver-salesmen, transport drivers, extra transport drivers, Olean special helper and Thrift Store sales clerks at its Jamestown plant and Olean terminal, excluding office clerical employees, administrative employees, guards, professional employees, and supervisory employees as defined in the Act.

2. By putting into effect on January 2, 1972, the economic proposals previously submitted to the aforesaid union without bargaining collectively with it concerning these proposals to an impasse, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by taking certain unilateral action regarding its economic proposals without first bargaining collectively to an impasse about such proposals, my recomended order will direct that the Respondent cease and desist from such conduct. My recomended Order will also contain the usual affirmative provisions requiring the posting of notices and the furnishing of a compliance report.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

Order[3]

The Respondent, Firch Baking Company of Jamestown, Inc., Jamestown and Olean, New York, its officers, agents,

[3] In the event no exceptions are filed to this recommended Order as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and Recommended Order herein shall, as provided in Section 10(c) of the Act and in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 15520, International Union of District 50, Allied and Technical Workers, as the exclusive bargaining representative of the employees in the appropriate unit stated in the Conclusions of Law above, by changing the wages, hours or other terms and conditions of employment of the employees in the appropriate unit without bargaining collectively with the aforesaid union to an impasse about such changes.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its plant at Jamestown, New York, and at its terminal at Olean, New York, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading: "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix A.

(b) Notify the Regional Director for Region 3, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[5]

Dated at Washington, D. C.

OWSLEY VOSE
Owsley Vose
Trial Examiner

FORM NLRB-4727
(9-69)

APPENDIX

[SEAL] NOTICE TO EMPLOYEES [SEAL]

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT refuse to bargain collectively with Local 15520, International Union of District 50, Allied and Technical Workers by changing the wages, hours or other terms or conditions of employment of our employees in the appropriate unit stated below without

[5] In the event that this Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

bargaining collectively with Local 15520 to an impasse about such changes. The appropriate unit consists of:

Wholesale driver salesmen, wholesale extra driver-salesmen, transport drivers, extra transport drivers, Olean special helper, and Thrift Store sales clerks at our Jamestown plant and Olean terminal, excluding office clerical employees, administrative employees, guards and professional employees, and supervisory employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

FIRCH BAKING COMPANY OF JAMESTOWN, INC.
Employer

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor, Federal Building, 111 W. Huron St., Buffalo, New York 14202 (Tel. No. 716-842-3106).

APPENDIX B

NATIONAL LABOR RELATIONS BOARD DECISION AND ORDER OF SEPTEMBER 29, 1972

199 NLRB No. 62

D—6733
Jamestown and
Olean, N. Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRCH BAKING COMPANY OF JAMESTOWN, INC.

and

Case 3-CA-4719

LOCAL 15520, INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS

DECISION AND ORDER

On June 2, 1972, Administrative Law Judge[1] Owsley Vose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

Appendix B.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings, and conclusions[3] of the

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[2] Respondent has requested oral argument on the question of the lawfulness of its "fair, firm, final offer" bargaining strategy. However, we agree with the Administrative Law Judge that the only question to be decided here is whether an impasse had occurred at the time Respondent implemented its "fair, firm offer" without the Union's consent. On the latter issue, the record, exceptions, and briefs adequately present the positions of the parties, and therefore Respondent's request is hereby denied.

[3] In adopting the Administrative Law Judge's finding that Respondent did not bargain to impasse before unilaterally effectuating its economic proposals on January 2, 1972, we find significant Respondent's letters distributed to its employees and the employee members of the Union's bargaining committee on December 27 and 30, 1971. Attached to the December 27 letter was a copy of Respondent's letter to the Union enclosing its "fair, firm offer," which the Union did not receive until December 29. No bargaining sessions were held between December 27 and 30, when Respondent distributed another letter to the employees in which Respondent declared that:

> In the event that the union does not accept our fair, firm offer by the time that the contract expires [midnight January 1, 1972], we have no alternative but to make our fair, firm offer to you directly. And of course, we sincerely hope that you will accept it and continue on the job.

Respondent effectuated its "fair, firm offer" on January 2, 1972, as it had stated it would, even though that offer had been on the table at only two bargaining sessions on December 30 and 31 before the offer was implemented. In our view, this conduct provides additional support for our conclusion that no impasse had occurred at the time Respondent put into effect the 'fair, firm offer." Quite apart from Respondent's argument that *N.L.R.B.* v. *General Electric Company*, 418 F.2d 736 (C.A. 2), sanctions its "fair, firm offer" bargaining strategy, which argument we do not pass upon here, Respondent's December 30 letter to the employees makes it clear that the "fair, firm offer" was not so much an offer as it was a promise to Respondent's employees that a specified wage increase would be granted. Inasmuch as the employees were

(footnote continued on following page)

Administrative Law Judge and to adopt his recommended Order.[4]

199 NRLB No. 62

(footnote continued from preceding page)

promised the wage increase irrespective of its acceptance or rejection by the Union, before the increase had even been presented to the Union, therefore the wage increase was in fact a firm decision which removed the element of bargaining, and *a fortiori*, no good-faith bargaining impasse had resulted when the Respondent effectuated its "fair, firm offer." *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736; *Terry Industries of Virginia, Inc.*, 188 NLRB No. 102.

[4] Respondent contends here as it did unsuccessfully before the Administrative Law Judge that the complaint should be dismissed because the allegations of the complaint are unrelated to the underlying charge. The charge was filed on December 29, 1971, at least 2 days before Respondent's acts found unlawful herein. It alleged a violation of Sec. 8(a)(1) and (5) in that Respondent "refused to meet at reasonable times for the purpose of bargaining and attempted to by-pass the contractual bargaining representative and deal directly with the employees in the appropriate bargaining unit." The complaint alleged in essence that Respondent refused to bargain with the Union in violation of Sec. 8(a)(1) and (5) in that on or about January 2, 1972, Respondent unilaterally increased the wages and changed other benefits of its employees and bargained with individual employees rather than their union representative. We find that the complaint alleged unfair labor practices related to those alleged in the charge, and that the unfair labor practices grew out of the same course of conduct. *N.L.R.B.* v. *Fant Milling Company*, 360 U.S. 301 (1959). Therefore we find no merit in Respondent's contention.

Appendix B.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Finch Baking Company of Jamestown, Inc., Jamestown and Olean, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Sep 29 1972

.....
Edward B. Miller, Chairman

.....
Howard Jenkins, Jr., Member

.....
Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

Court of Appeals Opinion of May 29, 1973

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 716, 717—September Term, 1972.

(Argued May 8, 1973 Decided May 29, 1973.)

Docket Nos. 72-2187, 72-2317

FIRCH BAKING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

SMITH, MULLIGAN and TIMBERS,

Circuit Judges.

Petition by Company to review, and cross-petition by National Labor Relations Board to enforce, an order of the Board, 199 N.L.R.B. No. 62 (1972), requiring Company to cease and desist from unilaterally instituting changes in wages and other conditions of employment without adequate bargaining with the Union, in violation of Section 8(a) (5) and (1) of the National Labor Relations Act, and requiring Company to take certain affirmative action to remedy the violations.

Petition to review denied; enforcement granted.

Appendix C.

WENDELL DAVIS, JR., New York, N.Y. (McConnell, Scheuermann and Davis, New York, N.Y., on the brief), *for Petitioner.*

STANLEY J. BROWN, Atty., NLRB, Wash., D.C. (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Acting Assistant General Counsel, and William F. Wachter, Atty., Wash., D.C., on the brief), *for Respondent.*

TIMBERS, *Circuit Judge:*

The essential issue presented by the Company's petition to review, and the cross-petition by the National Labor Relations Board to enforce, an order of the Board, 199 N.L.R.B. No. 62 (1972), is whether there was substantial evidence to support the Board's conclusion that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a) (5) and (1) (1970), by unilaterally instituting changes in wages and other conditions of employment without adequate bargaining with the Union. We hold that there was substantial evidence to support the Board's conclusion. We deny the Company's petition to review and we enforce the Board's order.

I.

A three-year collective bargaining agreement between Firch Baking Company of Jamestown, Inc. (the Company) and Local 15520, International Union of District 50, Allied and Technical Workers (the Union) by its terms would have been automatically renewed on January 1, 1972 unless timely notice of termination or desire to modify was given by either party. Such notice was given by the Union in

October 1971. Negotiations for a new contract followed. Ten collective bargaining sessions were held, six before and four after the contract expired on January 1, 1972.

In view of the essential issue presented by the petitions before us, we focus upon the critical events of the five day period—December 27-31—immediately preceding the expiration of the contract. Prior to December 27, negotiations had bogged down, chiefly over the Union's proposal that at least some of the negotiations take place "on-the-clock" (during working hours), a proposal which the Company flatly rejected.

On December 27, the Company delivered to the employee members of the Union bargaining committee a letter enclosing a summary of the Company's "fair, firm offer", including increases in wages, changed pension benefits, changed health coverage and improved major medical benefits. This "offer" was in outline form, not in the form of proposed contractual provisions. On the same day, all bargaining unit employees received a copy of the Company's offer. The Union's chief negotiator received a copy of the offer two days later, on December 29, whereupon he immediately wired the Company that the Union was "willing and ready to meet immediately on mutually agreed time."

On December 30, the Company distributed to all bargaining unit employees another letter advising that if the Union did not accept the Company's "fair, firm offer" by the time the contract expired, the Company would have no alternative but to make the offer directly to the employees in the hope they would accept it and continue on the job. On the same day, at a bargaining session arranged by a federal mediator, the Company's offer was discussed item by item. With the exception of agreement on two non-economic proposals, the Company's offer was rejected by the Union in its entirety. A further bargaining session was scheduled for the following day, December 31, at 6 P.M.

Appendix C.

At the New Year's Eve bargaining session, the Company for the first time presented to the Union a document elaborating on and setting forth in contract form the Company's "fair, firm offer". Before the meeting was concluded at 11:45 P.M., the Company's offer had been fully discussed and agreement had been reached on a number of economic as well as non-economic provisions. Since agreement had not been reached on the basic contract itself, however, the Union's chief negotiator announced that he intended to have a federal mediator present at the next bargaining session.

Upon expiration of the existing contract at midnight on January 1, 1972, the Company immediately put into effect all provisions of its "fair, firm offer", including wage increases and other economic benefits. On January 4, the Company announced to its employees that "our unilateral offer to all of you has been in effect since 12:01 a.m. Sunday, January 2. This pay increase will be in the pay check you will receive next week."

During January and after expiration of the contract, four additional bargaining sessions were held, with the employees remaining on the job. At the final session on January 26, the Union agreed to submit the Company's entire contract package, as modified during negotiations, to the employees to determine whether it was acceptable. The employees on February 1 voted to accept the Company's offer as submitted. On February 16, a new contract was signed covering the period through December 31, 1974.

Going back for a moment, on December 29, after the Union received a copy of the Company's first letter to its employees enclosing a copy of the Company's "fair, firm offer" and with the Union and Company still unable to agree upon the hours that negotiations should take place, the Union filed unfair labor practice charges against the Company, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to meet at reason-

able times for bargaining purposes and by attempting to by-pass the Union and deal directly with its employees. A complaint was issued on February 16, 1972, the same day the new contract was signed, limited to the charge based on the Company's conduct in instituting changes in wages and other conditions of employment during the pendency of collective bargaining negotiations. The Union continued to press this charge.

Following a hearing before a trial examiner on March 27 and 28 at Jamestown, New York, the examiner on June 2 filed his decision which in effect upheld the Union's position. His recommended order, adopted by the Board on September 29, required the Company to cease and desist from unilaterally instituting changes in wages and other conditions of employment without adequate bargaining with the Union, and required the Company to take certain affirmative action, including the posting of notices, to remedy the violations.

II.

After nearly four decades of life under the National Labor Relations Act, few obligations are more firmly established than that of an employer pursuant to Section 8(a)(5) to bargain collectively with a union representing its employees, including its duty not to alter terms and conditions of employment without first giving notice to and conferring in good faith with the union. *NLRB* v. *Katz*, 369 U.S. 736, 742-43 (1962). "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747. And we have held that such unilateral action "at the end of the contract period" operates at a particularly sensitive point of labor-management relations,

for "the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with." *NLRB* v. *General Electric Co.*, 418 F.2d 736, 748 (2 Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

Viewed against these settled principles, the Company's conduct here in unilaterally instituting changes in wages and other conditions of employment during the pendency of collective bargaining negotiations, without affording an opportunity for good faith bargaining and agreement on its package offer, strikes us as a clear refusal to negotiate about affected conditions of employment under negotiation.

From the standpoint of timing alone, the extreme haste with which the Company put into effect its changes in wages and other conditions of employment is thoroughly convincing of bad faith in the negotiations, of disparagement of the union and of obstruction of the congressionally mandated duty to bargain collectively. The formal contract proposals of the Company's so-called "fair, firm offer" were not presented to the Union until the evening of December 31, a few hours before the existing contract was due to expire and hardly a day before the Company put the proposals into effect. Even the preliminary summary of these proposals had been disclosed to the employee members of the Union bargaining committee and to all bargaining unit employees only four days before the formal contract proposals were submitted; and the Union's chief negotiator learned about them two days later. The Company's unilateral action in putting the proposals into effect came after only two bargaining sessions were held following preliminary announcement of the proposals.

The nature of the Company's proposals was such as to demand adequate time for study and discussion—item by

item, not the entire program as a package. They involved wage increases for various categories of employees, entirely new pension benefits, changed health and life insurance plans and other changes in benefits. The form of retirement plan referred to in the Company's preliminary summary was not furnished to the Union until the December 31 meeting. The Company never provided the Union with a copy of its proposed insurance plan—showing details of its new medical, surgical and term life insurance coverage—before it became effective.

Finally, if anything further were needed to dispel any vestige of good faith bargaining intent on the part of the Company in making its "fair, firm offer" that was surely provided by the manner in which the Company communicated the offer to its employees. All else aside, the Company's letter of December 30 to its employees, advising them "[i]n the event that the union does not accept our fair, firm offer by the time the contract expires, we have no alternative but to make our fair, firm offer to you directly", surely placed the Company in the position, as we observed in another case, of "having created a view of the bargaining process that admitted of no compromise, [and of being] trapped by its own creation". *NLRB* v. *General Electric Co., supra,* 418 F.2d at 760. "The aim, in a word, was to deal with the Union through the employees rather than with the employees through the Union." *Id.* at 759.

Our careful examination of the record as a whole leaves us with the firm conviction that the Company became so enamored with its "fair, firm offer" technique that it ignored its basic duty of allowing adequate time and opportunity for reasonable discussion of the essential details of its offer. The Board, in its decision affirming the trial examiner in the instant case, stated:

> "Quite apart from [the Company's] argument that *N.L.R.B.* v. *General Electric Company,* 418 F.2d 736

(C.A. 2), sanctions its 'fair, firm offer' bargaining strategy, which argument we do not pass upon here, [the Company's] December 30 letter to the employees makes it clear that the 'fair, firm offer' was not so much an offer as it was a promise to [the Company's] employees that a specified wage increase would be granted. Inasmuch as the employees were promised the wage increase irrespective of its acceptance or rejection by the Union, before the increase had even been presented to the Union, therefore the wage increase was in fact a firm decision which removed the element of bargaining, and *a fortiori,* no good-faith bargaining impasse had resulted when the [Company] effectuated its 'fair, firm offer.' "

We agree. And despite the elaborate arguments which have been pressed upon us as to whether a company may unilaterally institute changes in wages and other conditions of employment without bargaining to impasse with the union about such changes, in our view this is not an "impasse case" at all. It more aptly might be called a "poisoned fountain case": the fountain was poisoned before it ever began to flow.

Petition to review denied; enforcement granted.

Appendix D

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of July, one thousand nine hundred and seventy-three.

Present: HON. J. JOSEPH SMITH,
HON. WILLIAM H. MULLIGAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

Docket #72-2187

FIRCH BAKING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Appendix E

Order of Court of Appeals Granting Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of August, one thousand nine hundred and seventy-three.

FIRCH BAKING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated June 12, 1973, to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is Granted.

J. JOSEPH SMITH
WILLIAM H. MULLIGAN (per JJS)
WILLIAM H. TIMBERS (per JJS)
Circuit Judges